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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 482

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

MOTION TO DISMISS OR AFFIRM BY CORNELIUS W. STYER.

PERRY R. MOORE,
FREDERICK H. STINCHFIELD,
Counsel for Appellee, Cornelius W. Styer.

STINCHFIELD, MACKALL, CROUNSE & MOORE,
Of Counsel.

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil Action No. 811.

CHICAGO, SAINT PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, ET AL.,
Plaintiffs,

vs.

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; AND CORNELIUS W. STYER, DOING BUSINESS AS NORTHERN TRANSPORTATION COMPANY,
Defendants;

GLENDENNING MOTORWAYS, INC.,
Intervening Defendant.

MOTION TO AFFIRM AND DISMISS.

Appellee, Cornelius W. Styer, pursuant to Rule 12, Paragraph 3, and Rule 7, Paragraph 4, moves that the judgment and decree of the District Court be affirmed.

The ground of the above motion is that the questions upon which the decision of the cause depends are so unsubstantial as not to need further argument.

This is a direct appeal from the final judgment and decree entered herein on June 12, 1943, of a specially consti-

tuted court of three judges. The judgment and decree were entered in conformity with the findings of fact, conclusions of law and decision of the court entered upon that date.

Appellants' complaint prayed that a portion of an order of the Interstate Commerce Commission be set aside and annulled. The lower court adjudged a dismissal of the complaint.

Service of the documents set forth in Rule 12, Paragraph 2, was made upon Appellee Styer on August 19, 1943.

ARGUMENT.

Argument will be addressed to the content of the assigned errors, and to that portion of the appellants' jurisdictional statement wherein it contends that the questions involved are substantial. Each of the latter documents raise the same points.

The decision of the Lower Court, and the Commission's order, well state the nature of the proceedings before the Commission. It need not be repeated here. Upon this motion it suffices to say that Appellee Styer projected the business of a motor carrier but two months before the Grandfather date of June 1, 1935, and filed two applications with the Interstate Commerce Commission for certificates of public convenience and necessity.

One of the applications was filed pursuant to the Grandfather Clause of the Act. Its determination depended upon the proof of "bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the *route* or *routes* or within the territory . . . ."[1]

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[1] Sec. 206 (Added August 9, 1935, as amended June 29, 1938, and September 18, 1940.) (U. S. Code, title 49, sec. 306.) (a) Except as otherwise provided in this section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in

We have emphasized "route or routes" because the Act contemplates operations over *routes*—not to and from *points*, as appellants contend. See Sec. 208, Part II, Inter-State Commerce Act (U. S. Code, Title 49, Sec. 308).

In this application, Appellee Styer sought the right to operate between Minneapolis and St. Paul, Minnesota, hereafter called the Twin Cities, and Mitchell, South Dakota, over three routes designated by the Commission, the Court and the parties as Routes Nos. 1, 2 and 3. A large number of the intermediate points upon each of these routes lies in South Dakota. The remainder are Minnesota points. The right to operate over routes 1 and 2, with service to all intermediate points upon the routes, was authorized by the Commission under this application (Grandfather). In addition, and pursuant to the same application, the Commission authorized Appellee to operate over Route 3, but between terminal points only, viz., the Twin Cities and Mitchell, South Dakota. Service to the intermediate points on Route No. 3 was denied by the Commission under this application.

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force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: Provided, however, That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate.

The other application, embracing the three routes, was filed pursuant to Section 207 (a), and its determination depended upon the finding by the Commission that the public convenience and necessity required the operation. The Commission, having granted the right to serve between the terminal points on Route 3 under the Grandfather Clause application, authorized Appellee, under the "public convenience and necessity" application, to serve the intermediate points on Route 3.[2]

The question before the Court, therefore, deals only with intermediate points on established routes. The Commission's finding that there were bona fide operations on the grandfather date between the *termini*, the Twin Cities on the one hand, and Mitchell, South Dakota on the other hand, is not questioned. The finding that there were bona fide operations on the grandfather date from the Twin Cities over the routes to the *intermediate route points in South Dakota*, and from those South Dakota intermediate route points to the Twin Cities, is not questioned.

The issue is reduced to the correctness of the Commission's grant of authority to serve small parts of these three routes, viz.: those intermediate points lying along the routes within the State of Minnesota. The issue as to the intermediate Minnesota points on routes 1 and 2 arises under the grandfather application. The issue concerning the intermediate points on route 3 arises under the "public convenience and necessity" application.

In short, the Commission, with foundation here undisputed, properly authorized the appellee Styer to serve between the terminal points and to and from a large number of the intermediate points upon the routes. Appellants object to the Commission's inclusion of certain intermediate points upon the routes—being those in Minnesota. The

[2] Other routes not here pertinent were granted, and some were denied.

Commission in accordance with the statute, Section 206(a) granted the routes. The appellants by this action seek to "break up" the routes granted and compel the motor carrier to refuse proffered shipments of the public destined to these Minnesota points, even though the trucks pass through each of them daily. Such a situation does not promote "economical and efficient service * * * in transportation * * *." as required by the national transportation policy. (Act of September 18, 1940, Chapter 722, Title 1, Section 1, 54 Statutes 899, amending Chapters 1, 8, 12 and 13 of Title 39 U. S. Code.)

The Commission's Grant of Authority under the "Grandfather" Application to Serve Intermediate Minnesota Points on Routes 1 and 2 Was Plainly Correct.

Appellants attack the Commission's order in the respects above mentioned upon two grounds. The first ground is that there was no evidence offered as to "grandfather service" to these intermediate route points in Minnesota, i. e., service on or before June 1, 1935.

The Commission, in the assailed order, found as follows:

> "Prior to June 1, 1935 applicant served the intermediate points on routes 1, 2, 4 and 5 of Brookings, Iroquois, Forestburg, and Madison, (South Dakota points). Applicant does not claim the right to transport interstate shipments from the Twin Cities to points on his routes in Minnesota, but claims that such points were served eastbound from South Dakota. Although the proof of service at intermediate points on the above routes is not impressive, when considered in connection with the fact that operations by applicant were instituted only 2 months prior to the statutory date and the testimony of applicant that he did not limit his service to terminal points but held out service to all intermediate points and actually solicited such business, we are convinced that he should be authorized to serve

all intermediate points on routes 1, 2, 4, and 5, and that a restriction to serve certain intermediate points in one direction only would make the authority granted unnecessarily complicated and it will not be imposed." (Our insert)

The lower court, after citing numerous Commission decisions, stated the long established principle followed by the Commission:

"The Commission has, in effect, ruled in similar proceedings that proof of actual operations as a common carrier to and from termini and some intermediate points on a regular route, *coupled with evidence of a holding out* of service and of a *willingness and ability to serve* all points on the route whenever shipments are offered, will justify a finding of bona fide operation to and between all points on the route. See Nevitt Common Carrier Application, 4 M. C. C. 298, 299-300; Consolidated Freight Lines, Inc., Common Carrier Application, 11 M. C. C. 131, 136; Knaus Common Carrier Application, 20 M. C. C. 669, 671; Los Angeles-Seattle Motor Express, Inc., Common Carrier Application, 24 M. C. C. 141, 145; Tarbet Common Carrier Application, 31 M. C. C. 63, 66-67." (Our emphasis)

The lower court further found:

"There was evidence before the Commission sufficient to justify the inference that prior to June 1, 1935, Styer was able to serve intermediate points in Minnesota on routes 1, and 2, and *had held out service* to such points." (Our emphasis)

Upon the precise issue, here presented, the lower court correctly said:

"In the instant case, it is apparent that the Commission regarded the proof of actual service between termini and to intermediate points in South Dakota,

> together with the evidence which tended to prove that Styer was offering and was able to serve intermediate points, whether in Minnesota or South Dakota, on the 'grandfather' routes, as sufficient to justify the grant which it made to Styer. Proper deference must be paid to the Commission's interpretation of the law which it enforces, Gregg Cartage & Storage Co. *v.* United States, 316 U. S. 74, 88, and, if there is any warrant in the record for the judgment of the Commission, it must stand. Rochester Telephone Corp. *v.* United States, 307, U. S. 125, 145-146. We think that the Commission's determination that Styer was entitled to the rights granted because of his bona fide operations as a common carrier on and prior to June 1, 1935 did not amount to an abuse of power."

And again:

> "It must be true, however, that the Commission, in determining the nature and extent of the "grandfather" rights of a carrier in a particular case, is not required to do so with mathematical precision, and that, within reasonable bounds, its estimate of the character and scope of the carrier's bona fide operation on and prior to June 1, 1935, must be accepted by the courts, which cannot substitute their judgment for that of the Commission."

Inasmuch as bona fide operation on the "grandfather" date without dispute existed between terminal points and to and from intermediate points in South Dakota, the only issue is whether or not there was evidence which tended to prove that Appellee Styer was *able* and was *offering* to serve the remaining intermediate points in *Minnesota.*

His ability to serve these points cannot be questioned. His trucks daily operated over the routes and *through* the intermediate Minnesota points. There was no "operating" or other reason why, on June 1, 1935, he could not have

served those points had the business been offered. Styer testified upon this point as follows:

> "The regular operation as indicated by the routes there on the map are the routes over which our trucks go daily and that service is given. These trucks go through these towns over those routes whether or not they have shipments for every town on every particular day."

Quotation is from Lower Court's decision. Map referred to is applicant's Exhibit 1, which shows only the Minnesota segments of the routes involved.

The evidence which tends to prove that Appellee Styer was "offering" to serve all points on these routes, whether in Minnesota or South Dakota, lies, in part, in his testimony, also quoted by the Lower Court in its decision:

> "On and prior to June 1, 1935, I solicited business for intermediate points on the regular routes I operated over. I contacted personally quite a few shippers * * *. It was my purpose from the beginning to solicit and render service to the intermediate points."

And again:

> "The drivers were instructed to solicit business from *all* towns on the routes which they passed, to solicit freight in either direction." (Appellant's Statement of Evidence, p. 16, Tr. 57.)

And again:

> "We accepted any freight we were able to get from the time we started. We solicited freight from all points along the route. * * *
>
> "Never at any time did I intend or offer to the public simply a non-stop operation between the Twin Cities and Huron prior to June 1, 1935. (Appellant's Statement of Evidence, p. 16, Tr. 54 and 55.)

The above testimony stands undenied and uncontradicted by any witness.

To the Lower Court it seemed "probable" that Appellee Styer was referring in his testimony to South Dakota intermediate points because "his tariffs apparently cover no other intermediate points on his routes." We submit, however, that the court properly adopted the Commission's interpretation of the testimony. The tariff referred to is Exhibit 5, a list of towns printed upon a card and circulated among shippers in the Twin Cities by Crabb, Appellee Styer's predecessor, and by the Appellee Styer. The towns listed were South Dakota points. It was not a "tariff" in present-day form. There was then no regulation of the rates, and tariffs, as we now know them, were not employed. To those familiar with the transportation fact situation here involved the reason why South Dakota points only were listed upon these cards was this: Shipments originating with shippers in Minneapolis and St. Paul, destined to intermediate Minnesota points on these routes constituted *intrastate* traffic which neither Crabb nor Styer was authorized to carry. Neither could pick up a shipment from shipper A in Minneapolis and lawfully deliver it to consignee X in Lamberton, Minnesota. The necessary result is that a card to be circulated to Twin City shippers need carry only the names of the points between which the movement would be *interstate*. The only shipments moving interstate westbound over Styer's routes to Minnesota points were those which he received by interchange from connecting carriers at the Twin Cities. These connecting carriers brought those shipments into the Twin Cities from Chicago and other points outside of the State of Minnesota. These shipments Styer could lawfully handle. So far as Crabb or Styer was concerned, an offer to Twin City shippers would attract shipments from the Twin Cities to points in South Dakota only. (Appellant's Statement of Evidence, pp. 15

and 35, Tr. 46. 47 and 48). Appellants would have the Commission and the Court believe that these South Dakota points named on the cards were the only intermediate points which Appellee Styer offered to serve. They were the only points to which Styer could render an interstate service to *Twin City shippers.*

We submit that the Lower Court was entirely correct in permitting the Commission's interpretation of the language to stand. Exhibit 1 to which Styer was referring was a map of Minnesota routes only and his testimony of necessity referred to Minnesota points. The Commission is daily involved in these somewhat complicated transportation situations, and could the more readily value and weigh the effect of the fact that Exhibit 5, being circulated to Twin City shippers only, listed South Dakota intermediate route points only.

Additional support for the finding that Appellee Styer offered and held himself out to serve these Minnesota intermediate route points is shown on the Appellant's Abstract of Styer Exhibit 7, p. 37 of Appellant's Statement of Evidence. The abstract shows the following points actually served after the grandfather date:

Route 1	*Route 2*	*Route 3*
Gibbon	Marshall	Jackson
Norwood	Gaylord	Worthington
Sleepy Eye	Slayton (2, 4)	Lake Crystal
Tracy	Ivanhoe	Fairmont
Balaton	Redwood Falls	Mankato
Lamberton		Adrian
Springfield		
New Ulm		

May we add that Appellant's abstract of Exhibit 7 is not complete. The exhibit itself reflects many more shipments each year of operation from April 1, 1935, to November 12, 1938.

In addition, the Commission, in its decision, found that the applicant's business grew to more than a million pounds per month.

The point is that Styer, on April 1, 1935, projected a motor carrier business which embraced all intermediate points on routes 1 and 2 on the grandfather date. He had been in business but two months. No business is born full grown. It takes time to develop it. It was as Styer testified "because of various contacts at some of these towns, we got much more freight there. I was born at Huron and was well acquainted there, and consequently, Huron developed faster than at some other points." (Appellant's Statement of Evidence, pp. 15, 16.)

The fact that he obtained traffic to these Minnesota points *after* June 1, 1935, simply meant that such traffic was the fruit of his efforts at solicitation from the beginning of his business on April 1, 1935, and extending to and on the grandfather date of June 1. It corroborated, we submit, his own testimony of solicitation at those points prior to and on the grandfather date.

The record contains several like evidences of Styer's offer to serve these intermediate route points in Minnesota. The above is sufficient to demonstrate that the Commission's finding was based upon substantial evidence.

It is apparent that the principal question in this case is one of fact. In reaching a conclusion the Commission was called upon to weigh the evidence. It did so. It believed Styer's testimony that he did solicit traffic to and from these Minnesota points and that service thereto was embraced within the general plan which he projected on April 1, 1935. It is the law, as we understand it, that the Court will not declare invalid the Commission's decision where the case turns upon the weight which the Commission gives to the evidence before it.

We submit that a substantial question is not presented to this Court where the principal question involved is the weight of the evidence before the Commission.

In *McArthur et al.* v. *United States*, 315 U. S. 787, 86 L. Ed. 1192, 62 Sup. Ct. Rep. 915, the court granted the motion to affirm upon the ground that the questions therein involved were not substantial. A reference to the lower court's decision (44 Fed. 697) indicates to us that the only question there involved was whether or not there was substantial evidence in support of the Commission's disposition of the problem.

In *Alton R. Co. et al.* v. *United States, et al.*, 315 U. S. 15, at 23, the court said:

> "The weighing of such evidence involves in part a judgment based on the characteristics of the highly specialized transportation service involved. Thus, as we have said, that function is peculiarly one for the Commission, not for the courts."

And again:

> "The question whether his operation in a particular state was 'bona fide' is a question of fact for the Commission to determine. • • •
> "Our task is ended if there is evidence to support the Commission's finding of bona fides."

In *United States et al.* v. *Carolina Freight Carriers Corporation*, 315 U. S. 475, at 481, the court said:

> "That involved a weighing of specific evidence in light of the complexities of this transportation service. The judgment required is highly expert. Only where the error is patent may we say that the Commission transgressed."

And again at 483:

> "We would not disturb those conclusions if only a question as to the weight of the evidence was involved."

And again at 490:

> "That entails not only a weighing of evidence but the exercise of an expert judgment on the intricacies of the transportation problems which are involved. That function is reserved exclusively for the Commission. (Citing cases.)"

In *Loving* v. *United States, et al.*, 310 U. S. 609, 84 L. Ed. 1387, 60 Sup. Ct. Rep. 898, this court affirmed the lower court's decision in *Loving* v. *United States*, 32 Fed. Sup. 464. In the latter case the three judge court said:

> "It is further held that the determination of controverted matters of fact arising in whether a carrier was in bona fide operation within the immunizing period of the Statute, was entrusted to the Interstate Commerce Commission. See United States *v.* Maher, supra. This court is therefore powerless to hear the evidence or to review the proof submitted to the Commission in the instant case."

And again:

> "The hearing of evidence is an exclusive function of the Commission and it may disbelieve or disregard any evidence as it seems unconvincing; it may give as much or as little weight to evidence as it seems proper. (Citing cases.)"

The granting of authority under the "Public Convenience and Necessity" application to serve intermediate points on route 3 is plainly correct.

As to the Intermediate Points on Route 3.

As aforesaid, the Commission, pursuant to proof under the "Grandfather" application, granted this Appellee the right to operate over route 3, serving termini of Minneapolis and St. Paul on the one hand, and Mitchell, South Dakota, on the other hand, but without service to the intermediate

points on that route. The route extends, generally, from the Twin Cities through Mankato, Worthington, Jackson and Luverne, Minnesota, and Sioux Falls, South Dakota, to Mitchell, South Dakota.

The correctness of the Commission's finding here depends upon proof of public convenience and necessity, not upon operation prior to and on June 1, 1935. In this case, Congress has commanded the Commission to make paramount the interests of the public.

Sioux Falls, South Dakota is the largest point in population upon the route, and at the hearing much of the testimony centered about need for service at that point. In its report the Commission also devoted much of its discussion to the showing respecting Sioux Falls. The Commission said, respecting the entire route:

> "There is other service between the Twin Cities and points on applicant's routes in South Dakota by rail and motor carriers, and no witness testified directly that applicant's service was absolutely necessary in the conduct of his business. However, the testimony of these witnesses, when considered in connection with the evidence of past operations by applicant conducted continuously since prior to October 15, 1935, the volume of freight handled by him and the fact that the business of other carriers operating in the same territory has also grown during the years immediately preceding the hearing, is convincing evidence that his service is fulfilling a public need and that we should not require the discontinuance of his existing service between the Twin Cities and Sioux Falls, Yankton, *and intermediate points on routes 3*, 6, 9, 10, and 11 in connection with operations over the routes applicant is found entitled to operate by reason of his 'grandfather' rights." (PP. 40, 41, Commission's Decision) (Our emphasis.)

The evidence concerning past operations to all points, including intermediate points, was voluminous. Appellee Styer had commenced business but two months before the

grandfather date. Thereafter, and in the normal, natural course of his business, traffic to and from all intermediate points was developed. The Commission said:

> "Applicant has shown that his business has grown continuously until in 1938 he was handling more than 1,000,000 pounds of freight per month." (P. 40, Commission's Decision.)

We submit that the actual use of service over a long period of time is the highest and best proof of public convenience and necessity. The public will not patronize an unnecessary service—at least for an extended period.

The Commission has long held that proof of past operations is evidence of public convenience and necessity. We cite but a few of the Commission's decisions thereon: In *Washburn Storage Company, Extension of Operations*, 29 M. C. C. 116; the Commission said:

> "We have consistently held that long-continued successful operation is evidence of public convenience and necessity."

In *System Transfer & Storage Co.*, BMC-8, 6 M. C. C. 657, the Commission said:

> "The fact that applicant has operated as a carrier of household goods in interstate commerce by motor vehicle since many years prior to June 1, 1935, raises a presumption that the public convenience and necessity require a reasonable extension of the territory served in proportion to the growth of applicant's business."

In *Nathan I. Snyder, Common Carrier Application*, 7 M. C. C. 500, where Snyder had been in business for six or seven years, the Commission held that:

> "The performance of such operations for a long period of time * * * and continuing requests from customers to perform such service are evidence that applicant is able to continue to render the same service as

> he has in the past, and that the public convenience and necessity require continuance of such operations."

In *Brown Motor Freight Lines, Inc., Common Carrier Application*, 2 M. C. C. 667, the Commission said:

> "Applicant has served the public for a substantial period and its business has been steadily growing. In the absence of facts showing the contrary, this would be one method of determining public convenience and necessity."

In *Dougherty Storage and Van Co.*, 3 M. C. C. 427, the Commission said:

> "Successful operation in the past creates a presumption of public convenience and necessity requiring the continuance of such operation."

Appellants' "abstract of Styer's Exhibit No. 7" and "abstract of Styer's Exhibits 19 and 20", attached to their Statement of Evidence, shows the following shipments to the named intermediate points on route 3: Jackson, Mankato, Lake Crystal, Worthington, Fairmont and Adrian. Luverne and LeSueur are omitted from appellant's abstract, but shown in Styer's Exhibit No. 7.

The above are the principal points upon the route. Appellants' abstracts, however, are not complete. They are taken from the exhibits of record for proof of past operations. Appellee did not offer exhibits showing each and all of the multitude of shipments made between June 2, 1935, and the date of the hearing in 1938. He selected only certain months of operations; hence, appellants' abstracts cannot be complete as to the number of shipments or points served.

There was abundant evidence of past operations. The Commission rightly considered the fact of past public use as evidence of public convenience and necessity. That conclusion cannot be successfully assailed.

The Lower Court disposed of this question in a somewhat different, although entirely adequate, manner:

> "The plaintiffs argue that Styer's amendment to his application was equivalent to an assertion that he was unwilling to serve intermediate points in Minnesota on route 3, and that it deprived the Commission of authority to grant him the right to serve such points. We think that this argument is too narrow and legalistic. The primary concern of the Commission with respect to operations over route 3 was the public interest and the furtherance of the transportation policy declared in the Act. We have no doubt that under § 207 (a) and § 208 (a), the Commission could condition its grant of operating rights over route 3 to meet its conception of what public convenience and necessity required of Styer. That Styer was not unwilling to accept the full grant of authority made by the Commission has since been demonstrated by his actual acceptance and use of it. In urging that Styer received greater operating rights than he asked for or was willing to accept, it seems to us that the plaintiffs are urging a grievance which is not theirs."

In short, the Court has said that under Section 207 (a) requiring proof of present or future public convenience and necessity, the Commission has the power to require these intermediate points to be served. The Court also states that the same power exists under Section 208 (a). Section 208 (a) provides, in substance, that at the time of the issuance of a certificate under either Section 206 or Section 207, the Commission may attach such reasonable terms and conditions as the public convenience and necessity may require, and all of such terms and conditions as are necessary to carry out the national transportation policy.

As aforesaid, we submit that the proof of past operations and the volume of freight handled by Appellee during the three years preceding the hearing are ample evidence of

public convenience and necessity. The Commission, if acting under Section 208, had substantial reason for requiring service to these intermediate points. The proof of need for service to Sioux Falls, South Dakota, was compelling and is not here questioned by the Appellants. As a consequence, the Commission correctly found that Sioux Falls, South Dakota, the largest intermediate point upon the route, required the continuance of the service. In order to serve Sioux Falls and Mitchell, South Dakota, applicant's trucks must daily pass through the intermediate Minnesota points. All trucks are not loaded to capacity. In this northwestern area, the principal movement of goods is westerly. The "backhaul" is the carrier's problem. It is our view that the Commission desired to avoid the wasted transportation resulting from movement of empty trucks, or trucks not loaded to capacity, through these intermediate Minnesota points. It is so enjoined by the national transportation policy. Therein, the Commission has commanded the "prompt, safe, adequate, economical and efficient service", and to attempt to attain the end of developing a necessary transportation system by water, highway and rail adequate to meet the needs of commerce of the United States. Under this declaration of policy, there can be no question concerning either the power or the wisdom of requirement of the conditions imposed.

Eastbound Operation.

Appellants admit that an eastbound operation was conducted by appellee during the "grandfather" period. They dispute the characterization given it by the Commission. The Commission held that the eastbound operation was *in fact* a regular route operation and not an irregular route service. The appellants urge that the eastbound operation was an irregular route service and, in addition, claim that

such service was the only type of operation then being conducted by appellee. Neither of the appellants' claims is true. Appellee's testimony is quoted at length in the Court's decision. The language used by appellee is misconstrued by appellants. It is clear from the reading thereof that Styer had two types of operations: (1) one, the regular route operations between the Twin Cities and Mitchell, South Dakota in *both* directions, (2) and in addition, an irregular route operation—meaning between South Dakota points and all points within a described territory in Minnesota. Because the "back-haul" or eastbound tonnage out of South Dakota was light, Styer desired to be able to pick up shipments in South Dakota and transport them to any point in Minnesota.[3] This irregular operation was in addition, and, to a degree, super-imposed upon his regular operations. The testimony quoted in the Court's decision makes his claims sufficiently clear.

The Commission discussed these eastbound operations in its decisions at pages 38 and 39:

> "*In addition* to the operations conducted over regular routes described above, applicant also claims to have been engaged in the transportation of general commodities over irregular routes between points in that part of South Dakota described in his amended 'grandfather' application, on the one hand, and on the other, points in Minnesota. He explained that he did not keep complete records during the first few months of operation and that no billing was made on shipments moving from South Dakota points to points in Minnesota which were not handled through his terminal at the Twin Cities, where all of his billing was done. On the contrary such shipments were covered only by memoranda of the drivers on shippers' bills of lading, copies of which were not retained. He testified that in this service he hauled various commodities, including

[3] This territory was later reduced by amendment.

potatoes, farm produce, canned goods, construction machinery and supplies, building supplies and materials, machinery, printing presses, and household goods. Applicant's testimony relating to irregular route operations is supported by reference to only nine specific shipments handled on and prior to June 1, 1935, consisting of one shipment of potatoes from Atkinson, Minn., to Huron, one shipment of malted milk from Huron to White Bear, Minn., and one shipment of merchandise from St. Paul to Miller, S. Dak. Although applicant contends that records covering all such movements during that period are not available, an examination of the exhibits showing all movements during October and November, 1938, which are the only months after 1935 for which complete abstracts of shipments were furnished, and during which period no lack of documentary evidence is claimed, shows that out of approximately 3,300 shipments handled only 13 shipments are shown to have moved to or from only seven points which are not on his regular routes. While the testimony of applicant as to operations over irregular routes is substantiated by reference to particular shipments handled before June 1, 1935, might warrant granting of authority to operate over irregular routes, the complete documentary evidence covering a subsequent period during 1938 strongly indicates that applicant's business has evolved into that of a regular-route operation with only occasional or sporadic trips to off-route points or points in irregular-route territory. We conclude that upon the evidence we are not warranted in granting applicant authority to transport either general or specific commodities over irregular routes under the 'grandfather' clause of the act."

It will be noted that appellee, for a period after the grandfather date, carried some 3,300 shipments from South Dakota to points in Minnesota. All were destined to Minnesota points on his regular routes except 13 shipments which went to points not on such routes. This experience,

after the grandfather date, was correctly construed by the Commission to reflect the true nature of his operations and solicitation on or before June 1, 1935. The destinations of those shipments reflected the offer of service he was making on the grandfather date. The shipments, in fact, were the result of his solicitation efforts in building up the business.

The Commission denied the applicant's claim for irregular route service between South Dakota to Minnesota points, but granted the right to continue his regular route operation. Thus, the Commission granted appellee an authority which conformed to the facts as shown by the record.

There was no "conversion" by the Commission of appellee's business from an irregular eastbound operation to a regular route operation. As aforesaid, the Commission granted appellee the type of rights the facts warranted. In its opinion, the facts manifested an eastbound regular route operation and did not show an irregular route operation to a large Minnesota territory as his application requested. Hence, it is clear that the rule of *U. S. v. Maher*, 307 U. S. 148, cited by appellant, has no application to the instant case. Maher conducted an irregular route business, and nothing else, on the grandfather date. Thereafter, he commenced a regular route operation and abandoned the irregular type of operation. He changed from one type to another. It was held that his regular route operation could not continue without proof of public convenience and necessity. Here appellee, on the grandfather date, conducted the regular route operation and in addition thereto claimed that he operated an irregular service to a large Minnesota territory. The Commission granted the first, but denied the second.

The Commission's disposition of the problem was one resting solely in the conclusions it reached from the evi-

dence in the record. Again the question, in essence, is one of fact and involved the weighing of testimony.

The Court will not disturb such findings of the Commission. The question is not substantial, and no further argument is required.

Appellee's Stipulations and Amendments.

Appellants seek to make much of the incident that at the hearing the applicant Styer did not claim the right to serve intermediate points in Minnesota. Such was not the effect of the stipulation or amendment. By the stipulation under the "grandfather" application and the amendment under the "public convenience and necessity" application, Styer sought to exclude service in interstate commerce *between* Minnesota intermediate points only and in between those intermediate Minnesota points and points outside the State of Minnesota. (Statement of evidence page 18.) (Paragraph 3 of appellee's motion attached to appellants' statement of evidence.) Appellants have sought to make it appear that the stipulation and amendment excluded *all* service to or from these intermediate points in Minnesota. Such was neither the language nor the intent. Styer attempted to exclude service *between* intermediate points in Minnesota only upon these routes. This would have eliminated only the transportation of shipments taken by Styer through interchange with other outstate carriers at the Twin Cities. Styer continued service to, from and between these intermediate points in Minnesota from the beginning of his business through the date of the hearing in November 1938, and notwithstanding his offer of restriction at the hearing continued the same service thereafter until the Commission, by its decision, directed that there be no cessation of it.

The appellants urge that in some unexplained way the Commission is bound by the claims of parties to these pro-

ceedings. This is not an "adversary" proceeding in the sense of two private litigants before a Court with a dispute concerning *private* rights. The paramount concern of Congress and the Commission is the *public* interest and the furtherance of the national transportation policy. Congress had vested the Commission with great powers. These were to be exercised according to its judgment as to the needs of the public. In a real sense, there are three parties to the proceeding, viz: the applicant, the public and the protestants. When the public's interests are primary, the Commission is free to disregard the claims and stipulations of the parties. It would be strange, indeed, if a carrier, a public utility, could at will or by stipulation or amendment or otherwise dictate to the Commission the nature and extent of the authority it is to receive or the nature and, consequently, the extent of the service it is to perform. If the carrier could so dictate, he could and would serve only the larger and more profitable shipping points along these routes and leave the smaller communities without transportation service. Even a railroad cannot abandon lines without authority. If a motor carrier were legally free to do so, he could reject unprofitable types of freight and accept only those shipments which were profitable. The national transportation policy is designed to promote adequate, economical and efficient service to the end of establishing a national transportation system, and envisions the precise contrary of the contentions advanced by the appellant railroads.

The national transportation policy provides:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the *inherent* advantages of each; to promote safe, adequate, *economical*, and *efficient service* and foster *sound economic conditions* in

transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of *developing, coordinating, and preserving a national transportation* system by water, highway, and rail, as well as other means, *adequate to meet the needs of the commerce of the United States, of the Postal Service,* and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Upon the point raised, the Lower Court said:

"The plaintiffs argue that Styer's amendment to his application was equivalent to an assertion that he was unwilling to serve intermediate points in Minnesota on route 3, and that it deprived the Commission of authority to grant him the right to serve such points. We think that this argument is too narrow and legalistic. The primary concern of the Commission with respect to operations over route 3 was the public interest and the furtherance of the transportation policy declared in the Act. We have no doubt that under § 207(a) and § 208(a), the Commission could condition its grant of operating rights over route 3 to meet its conception of what public convenience and necessity required of Styer. That Styer was not unwilling to accept the full grant of authority made by the Commission has since been demonstrated by his actual acceptance and use of it. In urging that Styer received greater operating rights than he asked for or was willing to accept, it seems to us that the plaintiffs are urging a grievance which is not theirs."

Appellee points out, as the Court found, that he accepted the full grant of authority made by the Commission and

has since, as previously, rendered the service required by the certificate issue. He also urges, as did the Court, that the appellants are here urging a grievance which is not theirs to urge. The protestants are "parties" to the proceeding, but they are not *defendants* in the usual sense. Where the public is a more important "party" and its interests dictate a result contrary to these appellants' claims, the public must prevail.

At all events, whether to regard or disregard the appellee's interpretation and claims concerning his rights and duties was an administrative question for the Commission's determination. Whether or not the proferred restriction would complicate the authority granted was a problem for administrative consideration and disposition. It is clear to us that an alarming chaos could result if an applicant carrier, a public utility, could pick and choose the points he desired to serve. If the Commission were to authorize a carrier to serve Point A, permit him to avoid service to point B, authorize point C and omit point D—all on the same route and but a few miles apart—it would result in confusion to shippers. There are thousands upon thousands of small towns in this country. A large shipper should not be forced to ascertain whether carrier X serves points B, C and D, or whether carrier Y serves point A and carrier Z serves point E, all on the same route. This result does not promote efficient service to the public. Such situations must have impressed the Commission because it refused to permit the restriction Styer offered.

Administrative questions will not be disturbed by the Courts so long as the Commission stays within the bounds of its statutory powers.

Rochester Telephone Corporation v. *United States*, 307 U. S. 125, 59 Sup. Ct. Rep. 754.

Kansas City S. R. Co. v. *United States*, 231 U. S. 423, 58 Law Ed., 296.

United States v. *Carolina Freight Carriers Corporation*, 315 U. S. 475.

Federal Radio Commission v. *Nelson Bros. Bond & Mtg. Co.* (1933), 289 U. S. 266, 276, 277, 77 L. Ed. 1166, 53 S. Ct. 627, 89 A. L. R. 406.

Inasmuch as the wisdom of the disposition of such questions is for the administrative body and not for the Courts, issues concerning them are not substantial.

CONCLUSION.

We submit that the questions raised are so unsubstantial as not to require further argument.

The only questions raised are: (1) the weight to be given the evidence, and (2) administrative questions concerning which the Court cannot substitute its judgment for that of the Commission. The law is, and ought to be, that these questions are not for the Courts, but for the expert judgment of the Commission. No other questions are here presented.

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AND PERRY R. MOORE,
For Appellee Styer.